Hj Zainie Abdul Aucasa (suing on behalf of the Sabah Wetland Conservation Society) v Yabi Yangkat (Director of Sabah Environment Protection Department)

HIGH COURT (KOTA KINABALU) — APPLICATION FOR JUDICIAL REVIEW NO BKI-13JR-6/3 OF 2013
CHEW SOO HO J
31 OCTOBER 2013

Administrative Law — Judicial review — Certiorari and mandamus — Whether respondent's decision not to forward applicant's appeal to Environment Appeal Board correct in law — Whether applicant's 'appeal' not a matter appealable under s 47 of the Environment Protection Enactment 2002 and therefore same could not be forwarded by respondent to Appeal Board for consideration — Whether court in judicial review application only concerned with propriety of decision making process and not whether decision on merits fair and reasonable

A property developer proposed to construct a 31-storey condominium on its land in Kota Kinabalu ('the project'). For the approval of the project's development plan, the City Hall required the developer to obtain an environment impact assessment ('EIA') approval from the respondent. Since the proposed development did not fall within 'prescribed activities' as defined in the First and Second Schedules of the Environment Protection (Prescribed Activities) (Environment Impact Assessment) Order 2005 ('the Order') enacted under s 12(2) of the Environment Protection Enactment 2002 ('the Enactment'), no EIA report under s 12 of the Enactment was necessary. The respondent, however, approved an EIA report for the project under s 13 of the Enactment which allowed him to require an EIA report or a proposal for mitigation measures to be submitted by an applicant for any activity not prescribed under s 12 if he was of the opinion such development activity had or was likely to have an adverse effect on the environment. The applicant, who was president of the Sabah Wetlands Conservation Society, contending he was a 'person aggrieved' by the respondent's approval of the EIA report, submitted an appeal to the respondent under s 47(a) of the Enactment for the matter to be referred to the Environment Appeal Board ('the board'). The respondent did not forward the applicant's appeal to the board contending that his approval of the EIA report was made under s 13 of the Enactment and therefore was not a matter appealable under s 47 of the Enactment. The applicant filed the instant judicial review application for an order of certiorari to quash the respondent's decision not to forward his appeal to the board and for an order of mandamus compelling the respondent to do so. Besides setting out the merits of his appeal,

the applicant contended that the respondent's decision not to forward his appeal to the board denied him of his rights to appeal and to be heard by the board and was an act of unfair discrimination in violation of art 8(1) of the Federal Constitution. Section 47 of the Enactment allowed any person aggrieved by any decision of the respondent under ss 12 or 17 or an abatement notice issued under s 37 of the Enactment to submit an appeal to the respondent within 30 days of his decision whereupon the respondent was required to forward the same to the Chairman of the Board.

Held, dismissing the application with costs of RM3,000:

(1) Since the respondent's decision was made under s 13 of the Enactment, it was not a decision that was appealable under s 47(a) or (b) or (c) of the Enactment. The respondent had a legal duty and obligation to ensure that an appeal satisfied one of the situations in s 47(a), (b) or (c) before it could be forwarded to the Appeal Board. As the applicant's purported appeal failed to satisfy any of the three situations in s 47, the respondent's refusal to forward it to the Appeal Board was in compliance with the law. There was no error in his decision-making process and he had not breached his public duty (see para 11).

(2) The proposed development in this case did not fall within the category of 'prescribed activities' under s 12 of the Enactment. Consequently, the respondent could only consider and approve or reject an EIA report under s 13 of the Enactment which related to non-prescribed activities. A decision under s 13 was not subject to appeal under s 47(a) of the Enactment. There was no issue of unfair discrimination or a violation of art 8(1) of the Federal Constitution. The only question was whether the provisions of the Enactment and/or the Order were correctly invoked and construed (see paras 6, 8 & 10).

(3) The court's function in judicial review was supervisory in nature and it was only to consider the decision-making process and not whether the decision on the merits of the case was fair and reasonable unless there was illegality, irrationality or disproportionality none of which there was evidence of in the present case (see paras 3–4).

[Bahasa Malaysia summary

Pemaju hartanah telah mencadangkan untuk membina kondominium 31 tingkat atas tanahnya di Kota Kinabalu ('projek itu'). Untuk kelulusan pelan pembangunan projek itu, Dewan Bandaraya menghendaki pemaju memperoleh kelulusan penilaian impak alam sekitar ('PIAS') daripada responden. Oleh kerana cadangan pembangunan tidak termasuk dalam 'prescribed activities' sebagaimana ditafsirkan dalam Jadual Pertama dan Kedua Perintah Perlindungan Alam Sekitar (Aktiviti Yang Ditetapkan) (Penilaian Impak Alam Sekitar) 2005 ('Perintah itu') yang digubal di bawah s 12(2)

Enakmen Perlindungan Alam Sekitar 2002 ('Enakmen'), tiada laporan PIAS di bawah s 12 Enakmen itu diperlukan. Responden, bagaimanapun, telah meluluskan laporan PIAS itu untuk projek di bawah s 13 Enakmen yang membenarkannya untuk mendapatkan laporan PIAS atau cadangan untuk langkah-langkah mitigasi dikemukakan oleh pemohon bagi apa-apa aktiviti yang tidak ditetapkan di bawah s 12 jika dia berpendapat aktiviti pembangunan sedemikian mempunyai atau berkemungkinan mempunyai kesan bertentangan kepada alam sekitar. Pemohon, yang merupakan presiden Persatuan Pemuliharaan Tanah Lembap Sabah, berhujah bahawa dia adalah 'person aggrieved' dengan kelulusan responden tentang laporan PIAS itu, telah mengemukakan rayuan kepada responden di bawah s 47(a) Enakmen itu agar perkara itu dirujuk kepada Lembaga Rayuan Alam Sekitar ('lembaga'). Responden tidak mengemukakan rayuan pemohon kepada lembaga itu dengan berhujah bahawa kelulusannya tentang laporan PIAS itu telah dibuat di bawah s 13 Enakmen itu dan oleh itu bukan perkara yang boleh dirayu di bawah s 47 Enakmen. Pemohon telah memfailkan permohonan semakan kehakiman untuk perintah certiorari membatalkan keputusan responden untuk tidak mengemukakan rayuannya kepada lembaga dan untuk perintah mandamus mendesak responden berbuat demikian. Selain daripada menyatakan merit rayuannya, pemohon berhujah bahawa keputusan responden untuk tidak mengemukakan rayuannya kepada lembaga telah menafikan haknya untuk merayu dan didengar oleh lembaga itu dan adalah tindakan diskriminasi yang tidak adil melanggar perkara 8(1) Perlembagaan Persekutuan. Seksyen 47 Enakmen itu membenarkan mana-mana orang yang terkilan dengan apa-apa keputusan responden di bawah s 12 atau 17 atau notis pemberhentian yang dikeluarkan di bawah s 37 Enakmen itu untuk mengemukakan rayuan kepada responden dalam tempoh 30 hari daripada keputusannya yang mana responden dikehendakki mengemukakan yang sama kepada pengerusi lembaga itu.

Diputuskan, menolak permohonan dengan kos sebanyak RM3,000:

(1) Oleh kerana keputusan responden telah dibuat di bawah s 13 Enakmen, ia bukan keputusan yang boleh dirayu di bawah s 47(a) atau (b) atau (c) Enakmen. Responden mempunyai kewajipan undang-undang untuk memastikan bahawa rayuan itu memenuhi salah satu daripada situasi dalam s 47(a), (b) atau (c) sebelum ia boleh dikemukakan kepada Lembaga Rayuan. Oleh kerana rayuan yang dimaksudkan pemohon telah gagal untuk memenuhi mana-mana daripada tiga situasi dalam s 47, keengganan responden untuk mengemukakannya kepada Lembaga Rayuan adalah mematuhi undang-undang. Tiada kesilapan dalam proses membuat keputusannya dan dia tidak melanggar kewajipan awamnya (lihat perenggan 11).

(2) Cadangan pembangunan dalam kes ini tidak termasuk dalam kategori 'proposed activities' di bawah s 12 Enakmen. Berikutan itu, responden

hanya boleh mempertimbang dan meluluskan atau menolak laporan PIAS di bawah s 13 Enakmen yang berkaitan aktiviti yang tidak ditetapkan. Satu keputusan di bawah s 13 tidak tertakluk kepada rayuan di bawah s 47(a) Enakmen. Tiada isu tentang diskriminasi tidak adil atau pelanggaran perkara 8(1) Perlembagaan Persekutuan. Satu-satunya persoalan adalah sama ada peruntukan Enakmen dan/atau Perintah telah digunakan dan ditafsirkan dengan betul (lihat perenggan 6, 8 & 10).

(3) Fungsi mahkamah dalam semakan kehakiman adalah bersifat kawal selia dan ia hanya untuk mempertimbangkan proses membuat keputusan dan bukan sama ada keputusan itu berdasarkan merit kes adalah adil dan munasabah kecuali terdapat apa-apa yang menyalahi undang-undang, tidak rasional atau ketidakseimbangan yang mana tiada bukti sebegini dalam kes ini (lihat perenggan 3–4).]]

Notes

For a case on certiorari and mandamus, see 1(1) *Mallal's Digest* (4th Ed, 2014 Reissue) para 377.

Cases referred to

Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang [1997] 1 MLJ 241; [1997] 2 CLJ 225, CA (refd)

Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers [1991] 1 MLJ 417, SC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Legislation referred to

Environment Protection Enactment 2002 ss 12, 12(2), 12F, 13, 17, 37, 46(2), 47, 47(a), (b), (c)

Environment Protection (Prescribed Activities) (Environment Impact Assessment) Order 2005

Federal Constitution art 8(1), First Schedule, Second Schedule, paras 3, 3(i), (ii), (iii), 9, 9(i)(b), (ii)

Sabah Cultural Heritage (Conservation) 1997 Enactment

Mohd Alhafidz (Ngui & Assoc) for the plaintiff.

Dgku Fazidah Atun Pg Bagul (Mohd Ikhwan with her) (State Attorney General Sabah Attorney General's Chambers) for the defendant.

Chew Soo Ho J:

INTRODUCTION

[1] Laser Plus Design Sdn Bhd ('the developer') proposed to develop its land held under CL 0150005991 at Jalan Bukit Bendera, Kota Kinabalu into a condominium under its project known as 'Proposed Condominium Development on CL 0150005991 at Jalan Bukit Bendera Kota Kinabalu, Sabah' ('the proposed project'). For the approval of the development plan of the proposed project, the Kota Kinabalu City Hall required the developer to obtain an environment impact assessment ('EIA') approval from the respondent. However, since the proposed activities to be carried out in the proposed project do not come within the 'prescribed activities' as stated in the First and Second Schedule of the Environment Protection (Prescribed Activities) (Environment Impact Assessment) Order 2005 ('the Order') enacted under s 12(2) of the Environment Protection Enactment 2002 ('the Enactment'), the respondent did not require the EIA to be submitted by the developer for the said project on that land. Under the Second Schedule of the Order, only if the proposed development for housing covering an area of 50 acres or more, the earthwork of 40,000 cubic meters or more and for development of housing on hills with slopes having gradient of 20 degrees or more that the respondent would be required to approve the EIA report for the proposed project under s 12 of the Enactment. The development of the proposed project in this respect only involves an area of 2.74 hectares, 38,000 cubic meters of earthwork and hill slopes having gradient between 4 degrees–6 degrees only. Hence they do not fall under the 'prescribed activities' within the Schedules of the Order to require the respondent's approval under s 12 of the Enactment. The respondent nevertheless considered the EIA report under s 13 of the Enactment as report on non-prescribed activities and on 12 June 2012, this EIA report was duly approved. Subsequent to that, the applicant submitted an appeal on 13 August 2012 under s 47(a) of the Enactment for the matter to be referred to the appeal board. The respondent contended that the respondent's approval of the said EIA report under s 13 of the Enactment does not fall within any of the matters appealable under s 47 the Enactment. It was further contended that the applicant was not an aggrieved person and the appeal was made out of time.

[2] The applicant is the president of the Sabah Wetlands Conservative Society and filed this judicial review for, inter alia, an order of certiorari to quash the decision of the respondent vide letter dated 13 December 2012 on a breach of the principles of natural justice when the respondent had deprived the applicant's rights to be heard before the Environment Appeal Board formed under s 46(2) of the Enactment as an 'aggrieved person' and an order of mandamus for the respondent to perform his public duty by allowing the applicant to appeal to the environment appeal board under s 47(a) of the Enactment. The grounds relied on are, inter alia, the denial of the applicant of

the right of being heard and the right to appeal before the environment appeal board against the decision of the respondent in rejecting the applicant's appeal for the reason that the applicant, Sabah Wetlands Conservation Society is not an 'aggrieved person' to appeal under s 47(a) of the Enactment. In addition, the applicant listed out the grounds against the proposed development or construction of a 31 storey condominium on the alleged detrimental or adverse effect on the ridge conservation areas as well as on the mangrove eco-system with environmental pollution and disruption of the habitat around the Kota Kinabalu Wetlands (formerly known as Kota Kinabalu City Bird Sanctuary). It was also alleged that the proposed development will contravene the Sabah State Government's intention of declaring the Kota Kinabalu Wetlands as a conservation site and a cultural heritage under the Sabah Cultural Heritage (Conservation) 1997 Enactment.

FINDINGS OF COURT

[3] The law on judicial review is trite that judicial review is not an appeal from a decision but a review of the manner in which the decision was made and not the merits of the case. In brief, the function of the High Court in judicial review is supervisory in nature and that the court is only to consider the decision making process but is not to consider whether the decision on the merits of the case was fair and reasonable; see *Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* [1991] 1 MLJ 417419 (SC). However, since *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 (FC), exceptions have surfaced that the court in exercising its supervisory power may review the merits or facts of the case when there is illegality or irrationality or unproportionality.

[4] From the facts and affidavit evidence in this case, the contention and principal ground upon which the applicant is seeking judicial review is on the refusal of the respondent to allow the applicant to appeal against the approval of the EIA report of the proposed project of the developer. By such refusal, the applicant contended that their right to be heard and their right to appeal are being deprived of. Consequently, it was contended that the administrative action of the respondent had violated art 8(1) of the Federal Constitution on the equality before the law which constitutes unfair discrimination citing *Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang* [1997] 1 MLJ 241; [1997] 2 CLJ 225 (CA) on the essential elements of unfair discrimination.

[5] The respondent's contention is basically premised on the statutory provisions under the Enactment and the Order as recapitulated above and the interpretation thereof on the facts of the instant case.

[6] From what had been deposed and submitted by both parties herein, I do not find any issue or evidence of unfair discrimination, or a violation of art 8(1) of the Federal Constitution. The question is only whether the provisions of the Enactment and/or the Order were correctly invoked and construed or interpreted when the respondent had allegedly rejected or refused to forward or refer the appeal by the applicant to the environment appeal board under s 47(a) of the Enactment. Other grounds relating to the impact and/or the detrimental and/or adverse effect of the proposed development or construction of 31 storey condominium on the said land would be the merits of the case or the appeal and would have no significance in this judicial review since there is no evidence of illegality, irrationality or unproportionality which are the exceptions to warrant such consideration. Section 47 of the Enactment provides:

> 47 Any person who is aggrieved by—
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> (a) any decision of the Director under section 12; or
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> (b) any decision of the Director under section 17; or
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> (c) an abatement notice issued under section 37;
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> may within 30 days from the date of the final decision of the Director made under paragraphs (a), (b) or (c), submit an appeal to the Director who shall forward such appeal to the Chairman of the Appeal Board.

[7] Reading s 47 above, I find it amply clear that only in situation (a) or (b) or (c) as provided in this section where a person is aggrieved of that an appeal may be submitted to the director and the director shall then forward such appeal to the chairman of the appeal board. It is clear to me that once any of the situation (a) or (b) or (c) arises where an appeal is submitted to the director, the role of the director is mandatory that he shall transmit the appeal to the chairman of the appeal board. Hence, pursuant to s 47(a) of the Enactment, it is for the applicant to show that he is aggrieved by any of the decision of the director made under s 12 or made under s 17 or by an abatement notice issued under s 37 of the Enactment.

[8] The applicant is attempting to contend that the decision in refusing the applicant's appeal to the Environment Appeal Board by the respondent was pursuant to s 12 of the Enactment while the respondent contends that such decision was made under s 13 of same Enactment. In order to appreciate these two provisions of the Enactment, it must be distinguished in the first place whether an activity which is to be considered by the respondent for the protection of environment comes within the 'prescribed activities' in order for the provisions of ss 12, 12A to 12F of the Enactment to be invoked. If the activity does not fall within the 'prescribed activities' under s 12, an environment impact assessment report, inter alia, may still be required by the director to be submitted for consideration under s 13 of the Enactment. Hence, a decision made by the director relating to non-prescribed activities will

be pursuant to s 13 of the Enactment and such decision will not be subject to appeal under s 47(a). What are 'prescribed activities' within s 12 of the Enactment? Pursuant of s 12(2) of the Enactment, Environment Protection (Prescribed Activities) (Environmental Impact Assessment) Order 2005 was made to provide for such activities which are contained in the First and Second Schedules of the Order. The First Schedule provides the 'List of Prescribed Activities Requiring Proposal for Mitigation Measures' which is not relevant in the instant case. Second Schedule relates to and provides the 'List of Prescribed Activities Requiring Environment Impact Assessment Report' which is the ElA report which the respondent had approved and the applicant sought to appeal to the environment appeal board but was rejected. The relevant paragraph in this Second Schedule of the Order which relates to 'Housing, Commercial and Industrial Estates' provides:

3 Housing, Commercial and Industrial Estates—

(i) Development of housing, commercial or industrial estates covering an area of 50 hectares or more;

(ii) Conversion of wetland forests into housing, commercial or industrial estates covering an area of 30 hectares or more; or

(iii) Development of housing, commercial or industrial estates on hills with slopes having gradient of 20 degrees or more.

[9] Reading para 3 of the Second Schedule of the Order with s 12 of the Enactment, 'prescribed activities' as provided therein para 3 above are referring to only the three categories as stipulated in para 3(i), (ii) and (iii) above.

[10] The proposed development or construction of the 31 storey condominium as the facts show, involves land with an area of 2.74 hectares which is less than the 50 hectares or more as provided in para 3(i) of the Second Schedule of the Order while the slope gradient in respect of the proposed project is between 4 degrees–6 degrees whereas para 3(iii) of the Second Schedule of the Order provides for hills with slopes having gradient of 20 degrees or more. Hence the proposed project in the instant case does not fall within the categories of 'prescribed activities' within the meaning of s 12 of the Enactment since the other category under para 3(ii) involving 'conversion of wetland forests into housing' is not relevant to the proposed project. The respondent had also referred to para 9(i)(b) of the same Second Schedule and submitted that the earthwork involved in the proposed project was 30,800 cubic meter while para 9(ii) stipulates the earthwork with a volume of 40,000 cubic meters or more. A scrutiny of para 9 of the Second Schedule shows that it in fact relates to 'Quarries' and is unrelated to the proposed project which is 'housing development'. Thus, I do not find the necessity to look into para 9 which is not relevant in the instant case. However, even assuming that it does involve earthwork as all development project does and paras 9(i)(b) and 9(ii)

pertaining to earthwork need to be considered, the fact that the volume of earthwork involved in the proposed project falls short of the minimum cubic meters of the earth as stipulated under para 9(ii) of the said Second Schedule, renders the proposed project not to be construed as the 'prescribed activities' within s 12 of the Enactment. Consequently, the only provision for the respondent to consider and approve or reject an EIA report can only be under s 13 of the Enactment which provides:

> 13 The Director may require an environmental impact assessment report or a proposal for mitigation measures to be submitted by an applicant for any activity not prescribed under section 12 if the Director is of the opinion that such development activity has or is likely to have an adverse effect on the environment.

[11] The decision made by the director must therefore be a decision under s 13 of the Enactment. Since the decision of the director was made under s 13 of the Enactment it is not a decision that can be categorised under s 47(a) or (b) or (c) of the Enactment to be appealable by any person who is aggrieved by such decision or abatement notice. I find that it would be in contravention of a clear provision of the Enactment under s 47 if the director/respondent were to forward such purported appeal by the applicant to the environment appeal board. The director's role under s 47, to reiterate, is that he 'shall forward such appeal to the Chairman of the Appeal Board'. For that, I find that there is a legal duty and obligation on the director to ensure that an appeal must satisfy one of the situations in s 47(a) or (b) or (c) of the Enactment to satisfy the prescribed legal requirement which renders the matter appealable before such appeal 'shall be forwarded' to the appeal board. When the applicant's purported appeal fails to satisfy any of the three situations in s 47, I hold that the respondent's refusal to forward the applicant's purported appeal is in compliance with the law and cannot be held to have erred in law or breached his public duty in the circumstances of this case.

[12] For the foregoing reasons, I do not find any error in the decision process undertaken by the respondent in making his decision as complained by the applicant. Therefore, this application (encl 15) is dismissed with costs of RM3,000.

Application dismissed with costs of RM3,000.

Reported by Ashok Kumar